No. 12,777

IN THE

United States Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED, a corporation, *Plaintiff-Appellant* vs. W. RAY MONTGOMERY, FREDERICK H. MONTGOMERY and MONTGOMERY BROTHERS, a partnership, *Defendant-Appellees*	}

Appellant's Reply Brief

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TABLE OF AUTHORITIES CITED

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On February 21, 1949, when Fenwal wired Montgomery

> "JANUARY CHECK NOT RECEIVED. PLEASE ADVISE WHETHER SENT." (R. 145)

neither of them had breached their contract in any way. The situation was that Fenwal had given appropriate notice of termination which Montgomery had acknowledged, and discussions had occurred in regard to what Montgomery's profit should be on orders taken after notice of termination

for future delivery as to which Fenwal—not Montgomery—would have the service obligation and credit risk.

January shipments by Fenwal, amounting to $30,359.53, had been billed to Montgomery in a statement which Montgomery received February 7, 1949 (R. 363), and under the practice established between the parties this statement would normally have been paid by February 10th. But it had not been paid on February 21st; so Fenwal sent the wire quoted above. Montgomery replied on February 23d as follows:

> "RETEL PREFER TO WITHHOLD JANUARY CHECK UNTIL FUTURE RELATIONS ARE ESTABLISHED AS SUGGESTED IN OUR LETTER FEBRUARY 6Y15. BEST REGARDS." (R. 172)

After an exchange of wires, Montgomery reaffirmed its position by a telegram dated February 26, 1949, to Fenwal, reading as follows:

> "RETEL WE ARE NOT REFUSING PAYMENT YOUR INVOICES AND NEVER HAVE BUT WE PREFER TO WITHHOLD PAYMENT JANUARY INVOICES UNTIL SALES AGREEMENT IS SIGNED AS PER OUR LETTER FEBRUARY FIFTEENTH. WE ARE VERY ANXIOUS TO CONTINUE OUR VERY PLEASANT BUSINESS RELATIONS BUT MUST HAVE SUFFICIENT TIME TO PROTECT OUR LARGE INVESTMENT IN YOUR LINE. WE HAVE NEVER STOPPED FOR ONE MINUTE PROMOTING SALES AND EXPECT ALL FENWAL CUSTOMERS TO BE PROTECTED BY PROMPT DELIVERIES. BEST REGARDS." (R. 180)

Thus Montgomery refused to pay except upon a condition, viz., the execution of a new sales agreement. The $30,359.53

obligation for January shipments was unconditional and it was due. This refusal to pay an unconditional obligation for goods shipped, except upon a condition, was a clear breach of the contract and excused Fenwal from making any further shipments. The applicable authorities are cited at page 12 of Appellant's Opening Brief. Montgomery, while withholding payment, believed that Fenwal was in a "weak" financial condition (R. 303-304, 388), and obviously thought that withholding payment would bring Fenwal to Montgomery's terms on a new contract.

Even if it be assumed that the obligation to pay for goods shipped in January was not yet due on February 21, 1949 (an assumption without any support in the record), the refusal of Montgomery to pay except upon the execution of a new sales agreement was notice to Fenwal that Montgomery would not perform, and under California Civil Code Section 1440 and the authorities cited at page 13 of Appellant's Opening Brief, Fenwal was relieved of any obligation to make further shipments.

Montgomery's position is that it was entitled to continuing shipments, notwithstanding its refusal to pay an unconditional obligation for shipments previously made. We submit that this proposition is unsound. When Montgomery refused to pay, Fenwal was relieved of the obligation to make further shipments or to fill any more orders. It follows that Montgomery cannot have its profit on orders which Fenwal was not required to fill.*

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*The District Court allowed Montgomery profit on orders in two classifications: on Montgomery orders which Fenwal accepted prior to termination date (the profit amounting to $17,361.46, R. 72) and on orders which Fenwal never accepted (the profit amounting to $19,163.74, R. 72). Montgomery's refusal to pay what was admittedly owing and the plain indication that no payments would

Appellee's brief (p. 15) speaks of Fenwal's "rescission" or attempted rescission. Fenwal did not rescind nor attempt to rescind, nor was there any occasion for it to do so. It simply refused to make further shipments after notice from Montgomery that payment for past shipments would be withheld until a new contract was signed on Montgomery's terms. We have shown that Fenwal was legally justified in this position, and from the economic standpoint it would, of course, have been foolish, if not suicidal, for Fenwal to continue shipping without receiving payment for goods already shipped.

Most of the orders to Montgomery from its customers were assigned to Fenwal by Montgomery with the consent

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be made until Montgomery's independent objectives were achieved relieved Fenwal of all obligation to Montgomery. Moreover, as to orders in the second group, that is, those which Fenwal had never accepted, no obligation from Fenwal to Montgomery ever arose. The representation agreement provides that it "is to be construed and interpreted under the laws of" Massachusetts (R. 7). Under Massachusetts law contractual obligations between Fenwal and Montgomery arose only with respect to accepted orders and as to all unaccepted orders Fenwal had no obligation whatever. See *Eastern Paper & Box Co. v. Herz Mfg. Corp.,* 323 Mass. 128, 80 N.E.2d 484, 486 (1948).

> "Such an arrangement, if we assume it was not lacking in mutuality and consideration from the very beginning, Bernstein v. W. B. Mfg. Co., 238 Mass. 589, 131 N.E. 200; Gill v. Richmond Co-op. Ass'n, Inc., 309 Mass. 73, 34 N.E.2d 509, would amount to no more than an offer to enter into a unilateral contract as to each particular order which would ripen into such a contract upon the obtaining of an order by the plaintiff and its acceptance by the defendant but which would not prevent the defendant from withdrawing the offer as to future orders which the plaintiff might secure after notice of such withdrawal nor fasten any liability upon the defendant if it saw fit to sell directly to the United without paying the plaintiff any commission on the sales thereafter to the United."

See also *Gill v. Richmond Co-op. Ass'n,* 309 Mass. 73, 34 N.E.2d 509 (1941).

of Montgomery's purchasers under the letter agreement of March 9, 1949 (R. 194). After Montgomery refused to pay Fenwal for goods shipped and Fenwal refused to make further shipments, Montgomery was in peril of liability to its customers whose orders it had accepted. The orders to Montgomery from its customers were the basis for Montgomery's orders to Fenwal which the latter cancelled when Montgomery refused to pay. Irrespective of Fenwal's justification in cancelling the orders it received from Montgomery, because of Montgomery's refusal to pay, Montgomery remained bound to its customers on their orders and would be exposed to a substantial liability to them for non-performance. Thus Montgomery was greatly benefited by having those orders assigned to Fenwal and filled by it. This assignment transaction, though of benefit also to Fenwal in establishing a direct relationship with Montgomery's customers, affords no possible basis for a quasi-contractual recovery by Montgomery against Fenwal. The Court will note the important fact that the orders assigned to Fenwal and filled by it were *not* the same orders which Fenwal had cancelled because of Montgomery's refusal to pay, but were orders to Montgomery from its customers and which were of no concern to Fenwal prior to the assignment. The assignment agreement was an express contract, supported by an independent consideration, and specifically stated that it should not affect the rights of the parties. It did not affect the Montgomery to Fenwal orders which had been cancelled. As to them, Montgomery contended, as it does now, that it was entitled to have its orders filled, notwithstanding its refusal to pay for the earlier shipments; whereas Fenwal contended, as it does now, that Mont-

gomery's refusal to pay excused it from making further shipments. That question remained open when the assignment agreement was made and it is the question now before the Court.

Montgomery's cross-complaint was on its principal contract with Fenwal (R. 15-17), not upon any theory of quasi-contract arising out of the later assignment of the orders it held from its customers. The trial court, having concluded that Montgomery could not recover on the principal contract because of its unjustified refusal to pay for goods shipped, gratuitously and, we submit, erroneously, decided that Montgomery should recover on a quasi-contract theory that Fenwal received a benefit from the assignment of Montgomery's contracts with its customers. The difficulty with this approach is, first, that it ignores the fact that the assignment was under an *express* contract, supported by an independent consideration—benefit to Montgomery*—and affords no basis for recovery upon a theory of implied contract; and, second, it assumes, without any evidence, that the benefit to Fenwal under the assigned orders from Montgomery's customers was the same as Montgomery's expected profit upon the orders which it placed with Fenwal, and which Fenwal rightly cancelled because of Montgomery's refusal to pay—thus taking no account of Fenwal's expense in connection with the assigned orders or of the fact that Fenwal was compelled to bring a lawsuit against Montgomery for moneys admittedly due under the principal contract.

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*The assignments in each instance provided that Fenwal would "assume all of the obligations of Montgomery Brothers under the subject purchase orders and will perform and comply with the terms and conditions thereof." (R. 55, 57, 59, 61, 63, 65.)

Appellees made no claim for recovery in quasi-contract and the court below erred in permitting recovery upon that ground. Therefore, the judgment must be reversed.

Dated: July 18, 1951.

Respectfully submitted,

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